DEC 7
JOHN T. FEY,

Supreme Court of the United States

OCTOBER TERM, 1956

No. 614

LEROY STANLEY, CHARLIE WATTS WORRELL, JR., and BEN JACKSON, JR., PETITIONERS,

versus

UNITED STATES OF AMERICA, RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioners pray that a Writ of Certiorari issued to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case of November 8, 1956.

OPINIONS BELOW

The sentences imposed by the District Court (App. 13), are unreported. The opinion of the Court of Appeals (App. 14) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1956. (App. 15.) The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Sections 1254, 26 U. S. C., Sections 2803, 2810, 2833, 2913, 3115, 3116, 3253, 3321, and 18 U. S. C., Section 371.

QUESTION PRESENTED

Whether a co-conspirator can be cross examined with reference to an alleged confession made long after the conspiracy terminated and whether the alleged confession can be introduced in evidence, without instruction by the Court at the time of the cross examination and without proper instructions at the time of the introduction of the confession, that the statement could not be considered as evidence against co-defendants, but against declarent only.

STATEMENT

The Petitioners, Stanley, Worrell and Jackson, along with eight other defendants, were indicted for a conspiracy to violate certain provisions of the Internal Revenue Code and for substantive violations of the Code with reference to the manufacture, concealment, transportation and sale of non-tax paid whiskey. All of the defendants, with the exception of the Petitioners and one Milton Mack, either before or during the trial had plead guilty to the substantive acts, so that the case proceeded against the Petitioners and Milton Mack only.

The conspiracy was alleged to have begun some time in December of 1951 and terminated in January of 1953. As a part of its case in chief, the government attempted to introduce an alleged confession of Milton Mack, made to two of its agents in December of 1953, which statement involved each of the petitioners herein. Upon objection by defense attorneys, the introduction of the statement at

that time was ruled out. With the exception of Counts 9 and 10 of the indictment, which involved the incident of January 20, 1952, to both of which Stanley later admitted guilt, and Jackson to Count 9 only, this alleged confession constituted practically the only evidence either of a conspiracy or of substantive violations of the Code by the Petitioners.

After Milton Mack had testified on direct examination in his own defense, the Assistant District Attorney proceeded to cross examine him by reading from his purported confession and asking him line by line whether or not he had made such a statement, which he in each instance, insofar as the Petitioners are concerned, denied.

This was done over objection of defense attorneys, on the ground that the District Attorney was attempting to do by indirection what he could not do directly, and the Court was asked at that time to instruct the jury then that such evidence could be considered as against the witness only, but the Court refused to do so.

Again, at the close of the case, the government was permitted to introduce in evidence the purported confession of Milton Mack, without instruction from the Court that it could be considered against him only. The trial Judge in general charge also omitted such an instruction, and it was only at the very end of the case that he told the jury in general terms, and not specifically as requested by defense attorneys, that the confession and evidence could not be considered against the co-defendants. (App. 20.)

The jury found the Petitioners guilty of conspiracy, as well as various substantive acts, though all the testimony bearing on conspiracy was contained in the alleged confession of Milton Mack. Particularly is this true of the defendant Worrell, who did not admit involvement in any of the violations.

The Court sentenced Jackson to imprisonment for fifteen months and a fine of one hundred dollars, under the conspiracy count, and to imprisonment for fifteen months and a fine of one hundred dollars under counts 2, 3, 4 and 9, to commence at the expiration of the first sentence, but to stand suspended, and placed him on probation as to the second sentence for a period of four years.

The Court sentenced Stanley to a period of two and one-half years imprisonment and a fine of five hundred dollars on the first count, and to a term of imprisonment of two years and a fine of two hundred dollars, on counts 2, 3, 4, 5 and 9, to start at the expiration of the sentence on count 1, but suspended the second sentence and placed him on probation for a period of five years.

As to Worrell, the Court sentenced him to imprisonment for a term of two years and a fine of five hundred dollars on the first count, and to imprisonment for eighteen months and a fine of two hundred dollars on counts, 1, 3 and 4, to commence to run at the expiration of the first sentence, but to be suspended, and he was placed on probation for a period of five years.

The Petitioners appealed to the Court of Appeals for the Fourth Circuit, upon various grounds, the main one being, however, that the District Court committed error in refusing to instruct the jury at the time that Milton Mack was testifying and at the time that the government introduced his alleged confession, that such evidence could not be considered as evidence against the Petitioners here. The Court of Appeals affirmed the judgment of the District Court.

ARGUMENT

This Court has on numerous occasions stated, and it is too well settled to require argument, that a statement made by a conspirator implicating others after the end of the alleged conspiracy is not admissible as evidence against a co-conspirator. *Brown v. United States,* 150 U. S. 93 37 L. Ed. 1010; *Fiswick v. United States,* 329 U. S. 211, 91 L. Ed. 196; *Logan v. United States,* 144 U. S. 363, 36 L. Ed. 477; *Lutwak v. United States,* 344 U. S. 604, 97 L. Ed. 593.

The question before the Court at this time is whether or not a statement made by an alleged co-conspirator after the termination of the conspiracy is properly admissible in evidence, when the statement strongly implicates other defendants against whom it is incompetent, and if so, under what conditions, or phrasing the question in another way, are there exceptions to the above-stated rule of law, and if so, what are these exceptions and under what circumstances do they apply?

It is conceded that for the purpose of impeachment that statement of Milton Mack is admissible, and we agree with the language of the Fourth Circuit Court of Appeals when it said "—that Milton's statement was, in addition, competent proof as to the truth of his alleged criminal conduct, likewise is plain, for he was a defendant as well as a witness and this was his confession. These purposes entitled the statements to admission in evidence, notwithstanding that the other defendants were detrimentally mentioned in the statements." However, it is of interest to note at this point that not once did the government contend that Milton Mack's statement was a confession.

While the Courts have held that such a statement is admissible they have limited its effect as against the declarant only. This Court in *Lutwak v. United States,* 344 U. S.

604, 97 L. Ed. 593 was confronted with a similar set of facts as in this case. In that case this Court said:

> "Relevant declarations or admissions of a conspiracy made in the absence of the co-conspirator, and not in furtherance of the conspiracy may be admissible in a trail for conspiracy as against the declarant to prove declarant's participation therein. The Court **must be careful at the time of the admission** and by its instruction to make it clear that the evidence is limited as against the declarant only. Therefore, when the Trial Court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the deconspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch v. United States,* 336 U. S. 440, 93 L. Ed. 790. Such declaration is inadmissible as to all but the declarant."

The case at hand comes squarely under the above-stated rule of law. The government having failed in its initial effort to introduce the statement of Milton Mack, proceeded to cross-examine the declarant concerning the statement, reading it line by line, and upon objection by petitioner's counsel the Court overruled him and permitted the government to proceed without instructions. It was not until long after the statement had been admitted in this fashion that the Trial Court then gave a general admonition to the jury at the time the statement was offered in evidence. (App. 20.)

The Court of Appeals admitted in its discussion concerning admission of the statement that, "Undoubtedly, the jury was thus completely appraised of the comprehensive implication, by Milton and Vernell before the trial, of the appellants in the crime laid in the indictment" . . . and, "It is true that when the statements were bared to the jury the Court did not, on either occasion, give immediate ex-

planation to the jury of the limited effect they could give to the statement."

Having admitted that the statements were not limited by proper instructions, the Court's statement, "But we do not agree that this disclosure of the statements constituted reversible error." The opinion of the Court of Appeals was clearly in conflict with the law laid down by this Court in *Lutwak v. U. S., supra,* wherein it was said, "The Court must be careful **at the time of the admissions** and by its instructions to make it clear that the evidence must be **carefully and clearly limited by the Court at the time of their admissions,** and the jury instructed as to such declarations and the limitations put upon them." (Emphasis supplied.)

This Court in the *Lutwak case* did not stop after holding that the instructions must be given **at the time** of the admissions, but further stated that such statements must be "clearly and carefully limited" by instructions. It is easily seen that the two instructions given by the District Court (App. 20) were very definitely not such as would clearly and carefully limit the application of such evidence. Therefore the Court of Appeals in ruling that, "We believe that the Court's early observation to the parties of the presence of the jury, and its subsequent explicit directions to the jury, remedied its failure to give concomitant instructions as reference was made to this statement," was again clearly in conflict with the Law of the Land.

We must agree with Justice Jackson, who, in the case of *Krulewitch v. U. S., supra,* stated,

> "As a practical matter the accused is often confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even knew about, but which help persuade the jury of the existence of the conspiracy exists. The naive assumption that prejudicial effects can be over-

come by instructions to the jury—all lawyers know to be unmitigated fiction."

How then could the Court of Appeals state, "We find that the District Judge did warn the jury that the statements were not evidence against the appellants; and we think his admonitions were enough to avoid any prejudice to the appellants which the statements otherwise might impart to the jury," and not be in conflict with the law as set forth by this Court?

It is well to note at this point that while the Court of Appeals in the above-quoted portion of its opinion stated that they found that the District Judge did warn the jury that the statements were not evidence against the appellants, nowhere in its opinion have they (Court of Appeals) found that instructions were given at the publication of the statements to the jury by means of cross examination such as to satisfy the provisions set forth by this Court. Quite the contrary, the Court of Appeals held that such instructions were not given until quite some time later in the day.

It is also concluded that the Court of Appeals was in error when it stated that sufficient objections were not made concerning the introduction of the statement of Vernell Mack. Certainly Counsel for Petitioners put the Court on notice as to the exact objection being made when it was stated, "Your Honor, we would like to take the same position that Mr. Edens (another Defense counsel) took this morning as to the other statement to (of) Milton Mack, that this be confined to the same, strictly to Vernell Mack." It is difficult to see what words could have better expressed the position of the defense as to the introduction of Vernell's statement; a request that the Court limit the use of the statement to Vernell Mack.

As to the Court of Appeals' remarks that later request for limitation should have been made, it is rather hard to

do so with the Trial Judge, in open Court informs you when a proper objection is made, "You seem to be a little bit confused about the rules of evidence—That is elementary. Go ahead."

This statement is made of course with the realization that an attorney should possibly not let personal embarrassment stand in the way of his performing his duty to his client. However, it is readily admitted that after the remarks of the Trial Judge, attorney for petitioner was very much confused as to the rules of evidence.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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